No. 21,116

In the United States Court of Appeals for the Ninth Circuit

WALTER SELINGER, APPELLANT

v.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al., APPELLEES

On Appeal from the Order of the United States District Court for the District of Arizona

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BRIEF FOR THE APPELLEES

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OPINION BELOW

The District Court's opinion (I R. 126-132)[1] has not yet been reported officially.

JURISDICTION

This appeal involves a pre-indictment motion for the return of property and to suppress evidence. This

[1] "I R." references are to Volume I of the record, which is the court file.

motion was filed on November 16, 1965, and, after a hearing, the District Court denied it on April 27, 1966. The notice of appeal was filed on April 29, 1966, and on May 9, 1966, the District Court ordered that the Government be enjoined from examining the subject records or conducting any further investigation during the pendency of this appeal. This Court's jurisdiction has been invoked under 28 U.S.C., Section 1291.[2]

QUESTIONS PRESENTED

1. Whether a taxpayer has any standing to object where his accountant has turned over his own workpapers to agents of the Internal Revenue Service.

2. Whether any of a taxpayer's constitutional privileges are violated when he has voluntarily permitted agents of the Internal Revenue Service to examine and copy his business records in the course of a tax investigation.

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[2] This case contains the same questions as to the jurisdiction of the District Court and of this Court as were involved in *Goodman* v. *United States*, decided November 18, 1966 (No. 20,811). In view of this Court's decision in that case and denial of the Government's petition for rehearing, we do not brief these issues again. We do not, however, believe that the *Goodman* case was correctly decided, and we respectfully suggest that the complaint should have been dismissed as premature and lacking in equity, *Gentilli* v. *Caplin* (C.A. D.C.), decided March 3, 1964 (64-2 U.S.T.C., par. 9779), certiorari denied, 379 U.S. 890; *Zamaroni* v. *Philpott*, 346 F. 2d 365 (C.A. 7th), certiorari denied, 382 U.S. 903; *Kennedy* v. *Coyle*, 352 F. 2d 867 (C.A. 7th); and this appeal should be dismissed for want of a final order. *DiBella* v. *United States*, 369 U.S. 121, 131-132; *Hill* v. *United States*, 346 F.2d 175.

CONSTITUTIONAL AMENDMENTS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be secured, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

In his pleading denominated "Motion for return of property and to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure" the appellant, Walter Selinger (hereinafter referred to as "taxpayer"), alleged that certain documents had been photographed by Special Agent Bigler and Revenue Agent Landesman, and oral statements had been made to them in violation of his rights under the IV, V and VI Amendments to the Constitution of the United States. (I R. 1-2.) This motion was supported by the affidavits of taxpayer, his accountant and his office manager. (I R. 13-20.) The court issued a temporary restraining order and set a date for hearing on this motion. (I R. 21-22.) The Government thereupon moved to dismiss the complaint for want of jurisdiction over the subject matter and for failure to state a claim. (I R. 24.) Hearing was had before the court on December 13 and 14, 1965. (II R. 1-125, III R. 1-53.)[3] Thereafter taxpayer moved to reopen the hearing so that his attorney could offer testimony which would be in disagreement with part of that given by Special Agent Bigler. (I R. 64-68.) This motion was opposed by the Government (I R.

[3] "II R." references are to the transcript of December 13, 1965; "III R." references are to the transcript of December 14, 1965.

80-81), but at a subsequent hearing concerning taxpayer's allegations that the Government had violated the temporary restraining order this testimony was permitted. (V R. 47-56.)[4]

The court considered the conflicting testimony and depositions, and found the following facts. Taxpayer was advised by Special Agent Bigler of his official position and that of Revenue Agent Landesman. (I R. 129.) He was also told that they wished to see his business records for the purpose of investigating his tax returns, although he was advised by them that he did not have to show them these records or give them any information if he did not want to do so. (I R. 129-130.) Despite this warning as to his rights, taxpayer voluntarily and without any threats or promises agreed that the agents could examine his business records. (I R. 130.) Certain business records were turned over to the agents by taxpayer's accountant, Sidney Markow, voluntarily and not as the result of any threats, coercion or misrepresentation. (I R. 130.) The records shown to the agents by taxpayer's office manager, Rudy Boehmer, were made available voluntarily by taxpayer and Boehmer did not turn them over under the pressure of threats or coercion. (I R. 130-131.)

On the basis of these facts the District Court concluded that none of taxpayer's constitutional rights had been violated, and his motion for return of the photocopies and suppression was denied. (I R. 131.)

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[4] "V R." references are to the transcript of January 7, 1966, which has been numbered V in this Court's records.

SUMMARY OF ARGUMENT

Taxpayer has no right to object to the fact his accountant let the agents examine and copy his workpapers. It is undisputed that they belonged to the accountant and were voluntarily turned over to the agents by him.

None of taxpayer's constitutional privileges were violated by the examination and copying of his business records. The District Court, assessing the credibility of conflicting testimony, found that the agents identified themselves to taxpayer, and, without any trickery or deceit being practiced upon him, taxpayer voluntarily agreed to let them examine his business records. Moreover, the agents had no duty to advise taxpayer of his right to counsel, for this was a tax investigation, in which the agents have come to no conclusion as to whether or not any crime has been committed, and taxpayer was not in custody.

ARGUMENT

The District Court Properly Held That None of Taxpayer's Constitutional Rights Had Been Violated and Was Correct In Denying His Motion for Return and Suppression

A. *Taxpayer had no standing to complain of the examination and photocopying of the accountant's workpapers.*

It is undisputed that some of the records involved in this controversy are the accountant's workpapers. (II R. 65.) It is also undisputed that no special agreement as to the ownership of these workpapers

exists between taxpayer and his accountant. (II R. 42, 69-70, 79-80.) Thus, according to the ordinary accounting understanding, custom and practice in this country, these workpapers belonged to Markow and taxpayer had no right to prevent him from turning them over to the agents if he wished to do so. See, e.g., Stehler, Auditing Principles (1956), p. 80; Peloubet, Audit Working Papers (1937), pp. 2-4; *Deck* v. *United States*, 339 F. 2d 739, 740 (C.A. D.C.), certiorari denied, 379 U.S. 967; *In re Fahey*, 300 F. 2d 383 (C.A. 6th). As Markow admitted (II R. 77-80) and the District Court found (I R. 130), he freely and voluntarily turned these papers over to the agents. Thus no one may now question the right of the Internal Revenue Service to use these workpapers.

B. *Taxpayer failed to prove that the inspection and photocopying of his books and records constituted a violation of any of his constitutional privileges*

It is well established that oral admissions or personal documents *voluntarily* given to an identified investigating agent of the Internal Revenue Service, which were not induced by stealth, trickery or misrepresentation, are usable by the Service for all purposes, even though the person under investigation was not warned that the investigator suspected the existence of criminal fraud. *Kohatsu* v. *United States*, 351 U.S. 898, 902 (C.A. 9th), certiorari denied, 384 U.S. 1011; *Greene* v. *United States*, 296 F. 2d 382, 384-385 (C.A. 2d), vacated and remanded on other grounds, 369 U.S. 403; *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2d), certiorari denied, 360

U.S. 918; *United States* v. *Burdick*, 214 F. 2d 768, 773-774 (C.A. 3d), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932; *Turner* v. *United States*, 222 F. 2d 926, 930-932 (C.A. 4th), certiorari denied, 350 U.S. 831; *Montgomery* v. *United States*, 203 F. 2d 887, 893 (C.A. 5th).

The instant taxpayer's sole allegation is that he did not grant permission at all for the inspection of his records; the District Court, as finder of fact, chose to believe the testimony of Agents Bigler and Landesman that such permission was voluntarily granted. (I R. 130; III R. 5, 10-12, 13, 17, 21, 31-32, 37-39.) Moreover, despite taxpayer's denial, the court found as a fact that the agents had identified themselves to him in their official capacity, and that he was advised that he did not have to show them his records or give them any information. (I R. 129-130; III R. 5, 6-7, 36.) From this it is clear that taxpayer's records were not examined or photocopied in violation of the Fourth or Fifth Amendments.[5]

Nor is there any substance to taxpayer's argument (Br. 9-18) that the agents were required to advise him of his right to counsel. This Court, in the recent

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[5] Taxpayer does not argue on appeal that the fact that the records were photographed, rather than merely examined and copied by hand, makes any legal difference. It should be noted that the First Circuit has recently held that in this modern world the right to photograph records may be inferred from the right to examine them. *McGarry* v. *Riley*, 363 F. 2d 421, 424 (C.A. 1st), certiorari denied December 5, 1966, 35 L. Week 3201; see also *Boren* v. *Tucker*, 239 F. 2d 767, 771-772 (C.A. 9th); *Westside Ford, Inc.* v. *United States*, 206 F. 2d 627, 634 (C.A. 9th).

case of *Kohatsu* v. *United States*, *supra*, specifically held that the so-called "*Escobedo* rule" does not apply in a tax investigation, because the agents are not seeking to identify a person in custody as the perpetrator of an unsolved crime, but are investigating to determine whether in fact any crime had been committed. Accord: *Rickey* v. *United States*, 360 F. 2d 33 (C.A. 9th), certiorari denied, 385 U.S. 835. There is no allegation that taxpayer was in custody, and it is clear from Agent Bigler's testimony that at this point of the investigation he had not arrived at any conclusions concerning the existence of any deficiency in taxpayer's taxes, and so *a fortiori* he had reached no conclusion as to whether or not a crime has been committed. (III R. 25.)

Taxpayer seeks (Br. 13-14) to distinguish the instant case from *Kohatsu* on the basis that here the special agent was in the investigation from the beginning, because of an informer's letter, whereas in *Kohatsu* the special agent did not enter the investigation until the revenue agent had uncovered evidence of fraud. We submit that the source of information indicating the possibility of the existence of fraud, causing a special agent to enter an investigation, is irrelevant, and so this is a distinction without a difference.[6]

Taxpayer also seeks (Br. 14-18) to find support for his position from the Supreme Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436. We submit that, on

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[6] This Court recently had occasion to consider in some detail the functions of special agents. See *Wild* v. *United States*, 362 F. 2d 206.

the contrary, the entire thrust of the *Miranda* opinion was directed towards the problems facing a person suspected of committing an unsolved crime who is *in custody*. As the Court held (384 U.S. p. 478):

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is *in custody* is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. (Emphasis supplied.)[7]

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[7] Although it is true that the denial of certiorari cannot be taken as an indication of approval by the Supreme Court of the decision below, it might be noted that the Government stated in its brief in opposition in *Kohatsu* that the Court might deem it appropriate to defer action on that petition until after it had decided *Miranda* and its companion cases, which were then under advisement, even though we believed that certiorari should have been denied regardless of what might have been decided in *Miranda*. The Court did, in fact, hold back on deciding *Kohatsu* for three months after the brief in opposition was filed, and denied certiorari in that case one week after the *Miranda* opinion was handed down.

Thus it is clear that taxpayer has no legal grounds for reversing the instant case and is really seeking nothing less than a trial *de novo*, asking this Court to reweigh the facts and to redetermine the credibility of the witnesses, contrary to the well established rules governing appellate review. See, e.g., *Baumgardner* v. *Commissioner*, 251 F. 2d 311, 313 (C.A. 9th); *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. Even if this Court were to accept taxpayer's invitations to retry the case, however, we do not believe it could accept his inherently improbable tale.

For example, he testified that the agents came to see him just to meet him personally (II R. 9-10), that they did not tell him they were investigating his tax returns (II R. 10-11), and that although he was asked about his records, the agents never asked to be permitted to examine them (II R. 11-12). He also testified that although he saw his accountant in the parking lot after his interview with the agents, he merely told him to let him know if he should hear from the agents.[8] (II R. 36-37.) If in truth taxpayer did not want the records in his accountant's hands turned over to the agents, it is inconceivable that he would not have so stated to Mr. Markow at

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[8] The accountant's original version of this conversation was that taxpayer told him that "Mr. Bigler and probably his assistant, Mr. Landesman, will contact you," and they were identified as "Internal Revenue people." (Markow deposition, p. 19.) At the trial Mr. Markow tried to "judge" this testimony by stating that he might have misunderstood the question originally, and that at the time of the trial he could not recall exactly what had been said in the parking lot, nor would he probably have done so at the time of the deposition, either. (II R. 70-72.)

that time. Even more inconceivable is his testimony that despite his alleged upset over his accountant's cooperation with the agents, and his indication of his feelings on this matter to his office manager,[9] he never told the office manager not to make any records available to the agents (II R. 45, 100).

CONCLUSION

For the reasons set forth above the order of the District Court should be affirmed.

Respectfully submitted,

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[9] He claims that he told his office manager "They confiscated my records, and I am pretty disturbed." (II R. 45; II R 98-99.)

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of February, 1967.

Attorney.

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